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No. 99-60

In the
Supreme Court of the United States
October Term, 1999

RAINEY BROTHERS CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

MEMPHIS AND SHELBY COUNTY OF ADJUSTMENT and CITY OF MEMPHIS, TENNESSEE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Where a plaintiff-landowner seeks relief from a regulatory taking of its property and, as required by this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), proceeds to "ripen" its case by first seeking (and being denied) compensation in the state courts before seeking relief under 42 U.S.C. § 1983 in federal court, may a United States district court nonetheless dismiss such an action on the ground that the very process of "ripening" the case in the state court litigation—in the manner required by *Williamson County*—simultaneously works to bar it under the doctrine of *res judicata*?

2. *A fortiori*, may a United States district court so rule where it is conceded in open court that, in depriving the plaintiffs of their constitutional rights, the defendant municipality acted "arbitrarily, capriciously, and illegally" and where the municipality "in essence . . . stipulated that [it] had violated plaintiff's rights under both the Tennessee and United States Constitutions" (App. B, P. 8)?

3. Was it this Court's intention in *Williamson County* to single out American property owners as the *only* class of plaintiffs whose 42 U.S.C. § 1983 claims may *never* be heard in federal court, because the required process of "ripening" their causes of action in state court simultaneously serves to bar them from federal court, as held by the court below, which thereby intensifies a wide-ranging conflict of decisions in which the Third, Sixth, Ninth, and Tenth Circuits disagree with the Fourth, Fifth, and Eleventh Circuits?

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, attorneys for Pacific Legal Foundation have also represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997); and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years.

In particular, PLF attorneys have represented and supported individuals seeking, unsuccessfully, to utilize federal courts for redress from state-imposed uncompensated regulatory takings. *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir.), *cert. denied,* 119 S. Ct. 278 (1998) (represented Dodds); *Sinclair Oil Corporation v. County of Santa Barbara*, 96 F.3d 401 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 1386 (1998) (amicus); *Macri v. King County,* 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1178 (1998) (amicus).

Finally, Pacific Legal Foundation attorneys are also currently representing Mr. Bailey Jones in a petition for certiorari before this Court in *Jones v. City of Berkeley*, Supreme Court Docket No. 98-1774, another case in which a court denied a property owner relief for a regulatory taking.

Because of the Foundation's experience with Takings Clause litigation, it can contribute a unique perspective to this

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and ,furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Court as it determines whether to grant Rainey Brothers Construction Company's petition for writ of certiorari.

Counsel for Petitioner and Respondents have granted consent to file this brief and letters of consent are lodged with the Clerk of this Court.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

INTRODUCTION

The federal courts serve a critical function in protecting individual liberties from overbearing and oppressive governmental excesses—except when those excesses trench on the rights associated with the ownership of property. State courts do not have the last word on whether state or local officials have unconstitutionally infringed on a liberty protected by the Bill of Rights—except for state courts in those jurisdictions where the federal courts have turned their back on the rights of property owners. Admittedly, the workload of the federal courts is heavy. Congress' desire to federalize all manner of crimes and misdemeanors has taken a toll on the ability of the federal courts to manage their dockets. But should that toll be passed onto the shoulders of the owners of property? The rights of property ownership may not be universally appreciated by governmental agencies. The battles between landowners and governmental bodies can be long and contentious. Landowners who seek to develop property do not always win popularity contests. But, since the unpopularity of a class is never a reason to bar the doors of the federal courthouse, it behooves this Court to consider seriously the reasons why it is now virtually impossible for property owners to vindicate their federally protected rights in federal court.

REASONS FOR GRANTING THE WRIT

SUMMARY OF THE ARGUMENT

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court explained that a property owner who allegedly suffers an uncompensated regulatory taking at the hand of state or local officials must ripen a Takings Clause claim before going to federal court by first utilizing whatever remedies the state courts provide. *Id.* at 194-95. Only after failing to obtain relief in the state court system may the landowner seek relief in federal court. *Id.* At one time, this rule may have seemed sensible. But, in more recent years, as the lower federal courts have woven the *Williamson County* ripeness doctrine together with the principles of res judicata and collateral estoppel, it has become all too apparent that *Williamson County* is seriously flawed.

This brief will explain first the conflicting and harsh results the lower courts have wrought by combining the ripeness doctrine of *Williamson County* with the principles of res judicata and collateral estoppel. Next it will show the flaws that underlie *Williamson County's* explication of the ripeness doctrine for regulatory takings claims. Most significantly, the *Williamson County* decision cannot be harmonized with the long-established principle that a takings claim accrues when a government action affects the use or ownership of property and not when a claim for damages is litigated.

ARGUMENT

I

BECAUSE OF THE COMBINATION OF WILLIAMSON COUNTY WITH THE DOCTRINES OF ISSUE AND CLAIM PRECLUSION, PROPERTY OWNERS CANNOT LITIGATE REGULATORY TAKINGS CLAIMS IN FEDERAL COURT

In many jurisdictions landowners are at a complete loss when it comes to determining how they can get their takings claims heard in federal court. It is not for want of trying. The example of Rainey Brothers is only the latest in an ever lengthening series of cases where landowners have been denied an effective hearing of their federal claims in federal court.

Take the case of Thomas and Doris Dodd, chronicled variously in *Dodd v. Hood River County*, 855 P.2d 608 (Ore. 1993) (*Dodd I*), *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995) (*Dodd II*), *on remand*, 136 F.3d 1219 (9th Cir.) (*Dodd III*), *cert. denied*, 119 S. Ct. 278 (1998). After purchasing 40 acres in Hood River County, Oregon, the Dodds sought to build a home for their retirement. *See Dodd II*, 59 F.3d at 856. But between the time they purchased their land and the time they sought permission to build their home, the zoning laws changed. Their property was declared "forest use zone" and no structures could be built unless "necessary and accessory" for timber harvesting purposes. *Id.* Since estimates of the timber on the property ranged from $692 (the Dodd's expert timber appraiser) to $10,000 (a county employee who drove by the property), the County determined that the Dodds' home was (obviously) unnecessary for timber harvesting and denied the permit. *See Dodd III*, 136 F.3d at 1224.

At this point PLF attorneys, representing the Dodds, pondered their next step. The courts in Oregon were notorious in having never seen a regulatory takings claim that they liked. The only possible avenue of relief was the federal court. But

first there was the matter of *Williamson County*. So after completing the state administrative procedures, the Dodds sued in state court, expressly reserving any and all federal causes of action pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). *See Dodd II*, 59 F.3d at 857 and 862. Then they sued in federal court on those federal claims.

The federal case was stayed pending the outcome of the state case. *Dodd III*, 59 F.3d at 857 and 862. As expected, the Dodds lost in state court. *Id.* at 857. Upon resuming the federal court action the County argued that the doctrine of claim preclusion or res judicata should prevent the Dodds from litigating in federal court because a takings claim in state court was similar to the federal takings claim. The Ninth Circuit disagreed. It found that, because the federal Fifth Amendment takings claims were distinct from the state takings claims, the Dodds could proceed. *Dodd II*, 59 F.3d. at 862.[2] But the court opined that the doctrine of collateral estoppel or issue preclusion might apply instead and remanded the case. *Id.* at 863-65.

Once the case reached the Ninth Circuit again after the remand, the Dodds were told that collateral estoppel did indeed bar any litigation of the substance of any federal takings claim, despite the Dodds' protestations that the standards employed by the Oregon courts in determining whether there has been a regulatory taking are markedly different from the standards employed by the federal courts. *Dodd III*, 136 F.3d at 1227-30.

It is a different story in the Sixth Circuit. In *Rainey*, of course, the claimant did not utilize the device of an *England*

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[2] In *Dodd II* the court did not reach the question of whether a reservation based on *England v. Louisiana State Board of Medical Examiners* was necessary or effective. In *Dodd III*, it implied it was ineffective to counter the doctrine of collateral estoppel. 136 F.3d at 1227.

reservation (that the Dodds found to be ineffective in *Dodd II*). And unlike the Ninth Circuit, the court did not reach the question of whether collateral estoppel served as a bar to bringing a federal takings claim in federal court. Instead, the Sixth Circuit found that the doctrine of res judicata bars the litigation of Rainey Brothers Construction's federal takings claims in federal court—a holding diametrically opposed to *Dodd* in everything but ultimate result (the landowner loses). *Rainey Brothers Construction Company v. Memphis and Shelby County Board of Adjustment*, No. 97-5897, 1999 WL 220128, at *2 (upholding the "district court [judgment that] held the state court decision was indeed a decision on the merits and entitled to preclusive res judicata effect").

Whether it be collateral estoppel or res judicata, the result is the same for the landowners: they lose. As a practical matter it is impossible to get these federal courts to conduct an independent evaluation of whether a state or local regulation of property effects an uncompensated regulatory taking as proscribed by the federal Constitution. Unless this Court is to countenance the unavailability of the federal courts to litigants seeking to bring a regulatory takings claim based on the Fifth and Fourteenth Amendments, the doctrines of res judicata and issue preclusion must either be abandoned or modified in the context of *Williamson County*. Amicus respectfully suggests that the better answer is that *Williamson County* itself must be rethought. The next section will suggest that this Court can use the *Rainey* case as a vehicle for reevaluating *Williamson County*.

II

IT IS TIME FOR THIS COURT TO REEVALUATE ITS HOLDING IN WILLIAMSON COUNTY

There is a well-established principle that a claim for just compensation for a taking of private property accrues "at the time of [the] taking." *Danforth v. United States*, 308 U.S. 271, 284 (1939). Nevertheless, *Williamson County* has sown

confusion in this area, treating takings claims against state and local governments essentially nonaccrued until state remedies are pursued. When combined with the doctrines of res judicata or collateral estoppel, the takings claims cannot be litigated once they "accrue" for purposes of federal litigation. By predicating the *Williamson County* ripeness decision upon an erroneous assumption concerning when a takings claim accrues, this Court adopted a doctine of ripeness in *Williamson County* that has led to harsh and unsound results, such as in *Rainey Brothers* and *Dodd.*

The *Williamson County* Court

> granted certiorari to address the question whether Federal, State, and Local governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations.

473 U.S. at 185.

But this Court did not decide the case on the questions presented. Instead, *Williamson County* left the temporary takings issue "for another day," concluding that the property owner's claim for just compensation was "premature." *Id.* at 186. The primary basis for this conclusion was the Court's application of the rule that a regulatory takings claim

> is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Id. As the Court explained at length, *see id.* at 186-94, this rule had its antecedents in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981).

After having explicated the final decision requirement, the Court in *Williamson County* concluded that the petitioner planning commission's

> denial of approval does not conclusively determine whether respondent [property owner] will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

473 U.S. at 194. The opinion could have stopped at that point, but it did not. Without the benefit of briefing, the opinion posited a "second reason [why] the taking[s] claim is not yet ripe," namely, that the property owner "did not seek compensation through the procedures the State has provided for doing so." *Id.* As will be shown, this aspect of *Williamson County* deviated sharply from the Court's established Just Compensation Clause jurisprudence. Granting the petition for writ of certiorari would present a good opportunity for the Court to modify the unworkable state procedures requirement of *Williamson County*.

The *Williamson County* decision failed to acknowledge what has been the consistent rule of this Court for many decades: the government's taking of private property and the government's obligation to pay just compensation for such taking are concomitant, coming into being at the same time. This Court has, of course, formulated the rule in varying terms: the event of taking "gives rise to the claim for compensation," *United States v. Dow*, 357 U.S. 17, 22 (1958); *United States v. Clarke*, 445 U.S. 253, 258 (1980); compensation becomes due "at the time of taking," *Danforth*, 308 U.S. at 284; "an obligation to pay for" the land arose "when it was taken," *United States v. Dickinson*, 331 U.S. 745, 751 (1946); the claim for just compensation "accrued at the time of the taking," *Soriano v. United States*, 352 U.S. 270, 275 (1957), the government's duty to pay just compensation is triggered "[a]s soon as private property has been taken," *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 654 (1981)

(Brennan, J., dissenting). The *Williamson County* opinion put forth two reasons for silently departing from this longstanding rule, for labeling as "premature" a claim that *Soriano* (for example) had called "accrued." Both of these reasons were based on a misreading of precedent.

First, the opinion cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-20 (1984), for the proposition that this Court has

> held that takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act.

Williamson County, 473 U.S. at 195. But if "takings claims" are meant here to refer to monetary claims for just compensation for a completed taking of private property, then the cited passage from *Monsanto* did not even consider such claims, let alone declare them "premature" until after the property owner had sued under the Tucker Act.[3]

In *Monsanto*, the company brought suit in federal district court "seeking *injunctive and declaratory relief* from the operation of" various provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), alleging that "all of the challenged provisions effected a '*taking*' of property without just compensation, in violation of the Fifth Amendment."

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[3] The Tucker Act grants jurisdiction to the Court of Federal Claims to adjudicate "any claim against the United States founded upon . . . the Constitution." 28 U.S.C. § 1491(a)(1); *see also id.* § 1346(a)(2) (granting the district courts concurrent jurisdiction over such claims "not exceeding $10,000 in amount"). It is this jurisdictional grant that authorizes the Court of Federal Claims to hear and determine monetary claims against the United States for just compensation. *See, e.g., United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to determine.").

467 U.S. at 998-99 (emphasis added). Having first concluded that some of the challenged provisions might possibly operate to take Monsanto's property in certain circumstances, the Court went on to consider (in the passage later cited by the opinion in *Williamson County*) whether that conclusion afforded a basis for granting Monsanto the injunctive relief it had sought. The *Monsanto* Court ruled that it did not, based on the established rule that

> [e]*quitable relief* is not available to enjoin an alleged taking of private property for public use . . . when a suit for compensation can be brought against the sovereign subsequent to the taking.

467 U.S. at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could indeed be brought pursuant to the Tucker Act).

So Monsanto's claim for equitable relief under the Fifth Amendment was not *premature*, that form of relief was *not available* at all. As for a Tucker Act suit against the government in the Court of Federal Claims, asserting a *monetary* claim against the government, the *Monsanto* Court observed that the company could proceed to the Court of Federal Claims "[o]nce a taking has occurred." *Id.* at 1020.

It is inaccurate to state that a takings claim for just compensation against the federal government is not ripe until a claimant files a Tucker Act claim in federal court—because *that* filing is the claim for monetary relief. The *Williamson County* decision, therefore, read into *Monsanto* a conclusion about ripeness in the federal courts that was never intended and that is logically unsound.

The opinion in *Williamson County* attempted to translate the unsound proposition that "takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act" into an analogous proposition at the state level:

> Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. But if, as demonstrated above, the former proposition is erroneous, the latter is wrong as well. Indeed, the latter proposition creates its own, easily demonstrable logical difficulties.

Consider the typical state-law "procedure for seeking just compensation" against the state, namely, an inverse condemnation action against the state in its own courts. As to whether that state-court action is intended by the state to satisfy its *federal* constitutional obligation to pay just compensation for a taking, there are only two possibilities. First, if the "procedure" is simply a willingness on the part of state courts to adjudicate *federal* constitutional claims, then we have a situation analogous to the Tucker Act in the federal courts: it is illogical to state that a federal claim against the state (in state court) for just compensation is "premature" until the property owner has pursued a federal claim (in state court) against the state for just compensation.

On the other hand, if the state-court action is *not* intended by the state to satisfy its obligations under the Just Compensation Clause—if the "procedure" is rather one to enforce a right that arises under *state* law—then we have a situation where a property owner with a concededly "accrued" federal claim for just compensation is forced to postpone the assertion of that claim and pursue a state-law claim instead.

The notion that state compensation must be first pursued to determine whether there has been a violation of the federal Constitution in the first place is contrary to the established case law holding that the takings claims accrue at the time of the regulatory action that denies use of property. But, even if it

were more convenient to postpone federal proceedings in order to find out whether state law compensation will be paid, this is no reason to apply issue or claim preclusion to separate federal takings claims.

There may well be good reasons, grounded in considerations of comity and federalism, for such a postponement. But contrary to the assertion in *Williamson County*, these reasons have nothing to do with the "nature of the constitutional right" to just compensation. 473 U.S. at 195 n.13. Consistent with *Dow*, *Clarke*, *Danforth*, *Dickinson*, and *Soriano*, no court treats federal claims for just compensation for completed takings of property as *inherently* unripe or premature. That is, there is no state judicial system that refuses to adjudicate *federal* claims for just compensation on the ground that they are unripe or premature until a property owner has first pursued to completion all claims for compensation under *state* law. It is not difficult to cite numerous counter examples of state judicial systems that will hear and determine *federal* claims for just compensation *as soon as* a taking has occurred.[4] This Court, moreover, has routinely exercised jurisdiction to review state-court judgments concerning such claims without suggesting that the claims were unripe or premature because the property

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[4] *See, e.g., Jacobs Wind Electric Co. Inc. v. Department of Transportation*, 636 So. 2d 1333, 1337 (Fla. 1993) (contemplating that a patent holder would assert its claims under the Just Compensation Clause *along with* its claims under the state analogue and under state common law); *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 855 (Cal. 1997) (observing that property owner brought a claim for "'just compensation' in the form of lost rental income and interest" under both "article I, section 19 of the California Constitution and the Fifth Amendment of the United States Constitution"), *cert. denied*, 118 S. Ct. 856 (1998); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 930 (Tex. 1997) (finding ripe the property owner's "just compensation takings claims" brought at the same time "under the United States Constitution and [the] Texas Constitution").

owner had not *first* pursued claims for compensation under state law.[5]

The second basis for *Williamson County*'s rejection of the longstanding rule that claims for just compensation arise at the time of the taking was a supposed analogy between takings of private property "without just compensation" and deprivations of property "without due process of law." *See* 473 U.S. at 195. Where a person suffers a deprivation of property through "a random and unauthorized act by a state employee," the state's action "is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)).

Even assuming the validity of the analogy between the Just Compensation Clause and the Due Process Clause, *Hudson* does not provide the correct frame of analysis. That decision was premised on the fact of "a random and unauthorized act by a state employee." As even the opinion in *Williamson County* recognized, *Hudson* has no applicability to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure." *Id.* at 195 n.14. A taking is always effected pursuant to an established state policy or pro-

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[5] *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1009 (1992) (property owner did not first pursue state-law remedies for compensation; rather, once the regulatory agency had made final decision, owner "promptly filed suit in the South Carolina Court of Common Pleas" seeking just compensation for regulatory taking); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 308-09 (1987) (little more than a month after the ordinance was adopted, property owner brought action simultaneously seeking damages in tort and just compensation for a regulatory taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 424 (1982) (without first pursuing separate state-law remedies for compensation, property owner sued seeking damages for trespass and just compensation for government-sponsored physical invasion).

cedure; if the relevant injury to property results from a truly random and unauthorized act by a government employee, the property owner has suffered a tort, not a taking. In any event, the very notion that a state's action is somehow not "complete" until after the property owner avails himself of state-law compensation procedures cannot be reconciled with the rule that a state's taking of property, without more, gives rise to a "right to recover just compensation" on the part of the owner and a corresponding "obligation to pay just compensation" on the part of the state. *First English*, 482 U.S. at 315. Thus, while a postdeprivation remedy might allow the government to avoid liability for a denial of due process, once a taking has occurred, liability is unavoidable: "no subsequent action by the government can relieve it of the duty to provide compensation." *Id.* at 321 (internal quotation marks omitted).

The state-procedures portion of *Williamson County* has proved "unworkable," having "created confusion among the lower courts." *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63, 64 (1996). Federal courts of appeals have been forced into contortions to describe what, how, or if property owners might somehow "reserve" their federal claims for just compensation for a federal forum when they are forced by *Williamson County* to proceed in state court.[6] Moreover,

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[6] *See, e.g., Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989); *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275 (4th Cir. 1998); *Dodd v. Hood River County*, 59 F.3d 852; *Wilkinson v. Pitkin County Board of County*

(continued...)

even if property owners can manage to salvage the *formal* right to bring their federal claims in federal court, they may effectively lose that right through application of the rules of issue preclusion, *see, e.g., Dodd v. Hood River County*, 136 F.3d at 1227 ("Nor does the Dodds' previous reservation of this federal takings claim . . . prevent operation of the issue preclusion doctrine."), *cert. denied*, 119 S. Ct. 278 (1998), or claim preclusion, *see, e.g., Rainey Brothers*, 1999 WL 220128, at *2 ("preclusive res judicata effect").

In applying issue preclusion in *Dodd*, the Ninth Circuit has equated the state takings question, whether a land-use regulation "allows a landowner some substantial beneficial use of his property" for purposes of the compensation provision of the Oregon Constitution, with the federal takings question of whether "a land owner has been deprived of 'economically beneficial uses' of his property" for purposes of the Just Compensation Clause of the United States Constitution. 136 F.3d at 1225. In so doing, the court deprived the property owner of an opportunity *ever* to present its federal claims for a categorical taking to a federal court.

In applying claims preclusion in *Rainey Brothers*, the Sixth Circuit equated the rejection on procedural grounds of a regulatory taking claim in state court with the rejection on the merits of such a claim even when the state court procedural decision is admittedly "erroneous." 1999 WL 220128, at *3.

These kinds of decisions can be expected to multiply, given that nearly every state has a compensation provision that is (or has been interpreted to be) very similar to the Just Compensation Clause.

The combined effect of *Williamson County*, and the application of issue and claim preclusions, is to drive out of

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[6](...continued)
Commissioners, 142 F.3d 1319 (10th Cir. 1998); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992).

federal court virtually all federal claims for just compensation for takings of private property by state and local governments. This result is wrong on its face, and it is especially disturbing in light of the Court's firm refusal, with respect to *other* federal claims brought pursuant to 42 U.S.C. § 1983, to

> require[] exhaustion of state *judicial* or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.

Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (emphasis added), *quoted in Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982).

In actual practice, the state-procedures aspect of *Williamson County* has effectively caused the Just Compensation Clause, "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, [to] be relegated to the status of a poor relation," notwithstanding the Court's protestations to the contrary in *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). This is an unwarranted result.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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